Supreme Court, U.S.
FILED
JAN 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LLANO, INC.,

Petitioner,

v.

INTERNATIONAL MINERALS & CHEMICAL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

KEITH A. JONES *
JOHN B. RUHL
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

JAMES P. HOUGHTON
MARK B. THOMPSON, III
MODRALL, SPERLING, ROEHL,
HARRIS & SISK
1000 Sunwest Building
Albuquerque, New Mexico 87103

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in this diversity case involving a contract for the intrastate sale of natural gas, the court of appeals correctly construed the contract in light of New Mexico law and properly applied it to the specific facts of the case.*

---

* Respondent International Minerals & Chemical Corporation has no affiliates and only two partially owned subsidiaries—Farm Service Equipment Co., and Wilson Carbon Italia S.P.A.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT	2
ARGUMENT	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:

Eastern Air Lines, Inc. v. McDonnell Douglas Corporation, 532 F.2d 957 (5th Cir. 1976)	6
Schultz & Lindsay Construction Co. v. State, 494 P.2d 612 (N.M. 1972)	5
Smith v. Tinley, 674 P.2d 1123 (N.M. 1984)	5
Wisconsin Gas Co. v. FERC, 770 F.2d 1144 (D.C. Cir. 1985)	7
Wood v. Bartolino, 146 P.2d 883 (N.M. 1944)	6
Yankee Atomic Electric Company v. New Mexico and Arizona Land Company, 632 F.2d 855 (10th Cir. 1980)	5

STATUTES:

28 U.S.C. § 1254(1)	1
New Mexico Stat. Ann. § 55-2-615 (1978)	2, 5
New Mexico Stat. Ann. § 74-1-10 (1978)	8
New Mexico Stat. Ann. § 74-2-12 (1978)	8

FEDERAL REGISTER:

49 Fed. Reg. 22778 (June 1, 1984)	7

OTHER:

New Mexico Air Quality Regulation 508	3, 5, 6, 7
New Mexico Air Quality Regulation 705	8
Supreme Court Rule 17	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1041

LLANO, INC.,

Petitioner,

v.

INTERNATIONAL MINERALS & CHEMICAL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 770 F.2d 879. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1985. A petition for rehearing was denied on September 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

New Mexico Stat. Ann. § 55-2-615 (1978) in pertinent part provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section . . . on substituted performance:
>
> > (a) delay in delivery or nondelivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the contract was made, or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid; . . . .

STATEMENT

This diversity case involves a dispute over a contract for the intrastate sale of natural gas. Under the contract, petitioner Llano, Inc. ("Llano"), the operator of an intrastate pipeline in New Mexico, supplied natural gas to respondent International Minerals & Chemical Corporation ("IMC") for use at IMC's potash mine and processing facility near Carlsbad, New Mexico. Pet. App. A-2. The contract required IMC to pay a minimum annual bill if it did not make a minimum annual purchase of gas. *Id.* at A-3. The contract further provided, however, that the minimum bill would be adjusted "[i]n the event that . . . [IMC] is unable to receive gas as provided in this Contract for any reason beyond the reasonable control of the parties . . . ." Pet. App. A-5. The question presented here concerns the construction of this provision of the contract and its application to the particular facts of the case.

IMC needed natural gas principally to burn as fuel for nine large gas-fired boilers (known as "Ozarks") used in the extraction of potassium sulfate, or potash. Pet. App. A-5. The operation of these boilers produced a considerable amount of air pollution. *Id.* In 1978, the New Mexico Environmental Improvement Board ("EIB")

promulgated an air quality regulation ("AQR 508") requiring drastic reductions in such air pollution "as expeditiously as practicable." *Id.* at A-6. Compliance was required to be achieved in accordance with a "schedule of compliance" approved by the EIB. Pl. Ex. 20, p. 1.

After careful study and testing, IMC determined that, owing to a variety of technical constraints, it would not be able to achieve compliance with AQR 508 unless it discontinued use of the Ozarks and turned to some other method of extracting potash. Pet. App. A-6 n.1. *See also* I R. 291; III R. 247-48, 251; IV R. 456, 458-59, 471, 495, 504-14.[1] IMC concluded that its best hope of achieving compliance lay in the adoption of a new technology called the "salting out process." Pet. App. A-6 to A-7. In May, 1980, IMC sought and obtained from the EIB a schedule of compliance that provided one year within which to conduct a pilot test of the new process. *Id.* at A-7. During the test, the Ozarks were shut down and IMC's natural gas requirements were reduced by approximately 60 percent. *Id.*

The schedule of compliance provided that if, after the pilot test, the salting out "process is deemed commercially operational [IMC shall] provide supplemental compliance schedule which includes dates for the design, procurement, and construction of the process . . . by June 1, 1981." Pl. Ex. 25, p. 2. By March, 1981, it had become apparent not only that the salting out process was commercially operational but also that it had completely eliminated the air pollution previously associated with the extraction of potash and that no further design, procurement, or construction was necessary. Pl. Ex. 28; III R. 247. In accordance with the schedule of compliance, and to fulfill its duty to achieve compliance as expeditiously as practicable, IMC notified the EIB that

---

[1] "R." refers to the multi-volume record in the court of appeals.

the test had been successful and that "IMC will be able to immediately eliminate continued use of the [Ozarks] . . . ." Pet. App. A-7.[2]

As a consequence of the replacement of the Ozarks with the salting out process, IMC's purchases of natural gas from January 1, 1981, through the expiration of the contract on June 30, 1982, fell below the amount of the minimum purchase requirement specified by the contract. Pet. App. A-7. Llano was able to dispose of the gas elsewhere, however, at a higher price. *Id.* at A-7 to A-8; Pl. Exs. 47 and 48. IMC paid Llano for all gas actually delivered, but Llano demanded payment for additional gas not taken, based upon the contractual provision for a minimum annual bill. IMC refused on the ground that "the reduction in our gas consumption was necessitated entirely by the adoption and thereafter, enforcement, of a new regulation of the State of New Mexico Environmental Improvement Board directing reduction of particulate matter emissions from our [Ozarks] as expeditiously as possible." Pl. Ex. 32.

IMC then instituted this action for declaratory judgment in the United States District Court for the District of New Mexico. Llano counterclaimed for payment of the minimum bill. The district court construed the contract as requiring payment of the minimum bill unless state law "made illegal or prohibited absolutely IMC's daily purchase of 4800 million BTU's of gas." Pet. App. C-10. The court therefore ordered IMC to pay Llano approximately three and one-half million dollars. Pet. App. A-2.

The United States Court of Appeals for the Tenth Circuit reversed. The court of appeals noted, first, that

---

[2] Although the salting out process entailed lower fuel costs, it was less profitable than the process it replaced because it produced less potash. IMC estimated that it lost approximately $500,000 per year as a result of its conversion from the Ozarks to the salting out process. II R. 55.

the question before it involved simply the construction of of a commercial requirements contract in the context of governing New Mexico law:

> On a fundamental level, this case is one of contract construction. Our primary objective, as always, in the construction or interpretation of a contract is to ascertain the intention of the parties. *Schultz & Lindsay Construction Co. v. State*, 494 P.2d 612, 613 (N.M. 1972); *Yankee Atomic Electric Company v. New Mexico and Arizona Land Company*, 632 F.2d 855, 858 (10th Cir. 1980) (interpreting New Mexico law). We assume that the parties intended a reasonable interpretation of the language. *Smith v. Tinley*, 674 P.2d 1123, 1125 (N.M. 1984) . . . . As we examine the language [of the contract], an appropriate area to look for guidance is the common law doctrine of impossibility/impracticability, codified at Section 2-615 of New Mexico's Uniform Commercial Code (N.M. Stat. Ann. § 55-2-615 (1978)), which was the law in New Mexico at the time the parties contracted and which remains the law today.

Pet. App. A-9.

With those precepts in mind, the court of appeals stated that "[t]he determinative question, then, is: Did the promulgation of Rule 508 constitute an event beyond the reasonable control of IMC that rendered IMC 'unable' to receive its minimum amount of gas under the contract?" Pet. App. A-11. The court determined that, "construe[ing] the term in light of the common law as it existed in New Mexico when the contract was entered into . . . 'unable' is synonymous with 'impracticable,' as that term is used in the common law and in Section 2-615." *Id.* Under New Mexico law, the defense of impracticability requires only a showing that performance involves "extreme or unreasonable difficulty, expense, injury, or loss . . . rather than that it is scientifically

impossible." *Id.* at A-12, quoting *Wood v. Bartolino*, 146 P.2d 883, 886 (N.M. 1944).

The court of appeals therefore concluded that "[i]nasmuch as there was no technically suitable way for IMC to comply with the EIB's Regulation 508 without shutting down the Ozarks and changing to the [salting out process], with the concomitant decrease in natural gas consumption, we hold that . . . IMC was unable, for reasons beyond its reasonable control, to receive its minimum purchase obligation of natural gas . . . ." Pet. App. A-13. The court rejected Llano's contention that "IMC should have stalled in its negotiations with the state regulatory agency, which would have resulted in the pollution of air until the last minute." *Id.* The court explained:

> First, as a matter of policy, individuals and corporations who cooperate with local regulatory agencies and comply with the letter and spirit of legally proper regulations, environmental or otherwise, are to be encouraged. Stalling tactics are not regarded favorably. Second, as a matter of law, government policy need not be explicitly mandatory to cause impracticability. . . . *Eastern Air Lines, Inc. v. McDonnell Douglas Corporation*, 532 F.2d 957 (5th Cir. 1976). . . .

Id.

ARGUMENT

Llano's petition for a writ of certiorari is frivolous. This diversity case does not remotely satisfy the criteria for review by this Court. *See* Sup. Ct. R. 17. It does not even present a question of federal law. The decision of the court of appeals turned solely on the specific terms of the parties' contract, which the court construed in light of New Mexico law and applied to the particular facts of the case.

Llano contends that the decision below will raise doubts about the enforceability of minimum annual purchase requirements and minimum annual bills in other contracts and under other circumstances. Pet. 4-8. That contention is insubstantial. The court of appeals did not question the assumption that New Mexico law permits enforcement of such provisions in contracts for the intrastate sale of natural gas. The court held only that, under the particular facts and circumstances of this case, payment of the minimum bill was excused in accordance with the specific provision of the contract relating to occurrences beyond the reasonable control of the parties.[3]

Llano accuses the court of appeals of improperly construing the contract and New Mexico law in a manner that may encourage early compliance with governmental regulations. Pet. 8-9. Early compliance with environmental regulations is, of course, to be encouraged and applauded. This was not, however, a case of premature compliance. Not only did AQR 508 require compliance

---

[3] The Federal Energy Regulatory Commission has determined that minimum commodity bills in contracts for the *interstate* sale of natural gas are "unjust and unreasonable" as a matter of federal law, 49 Fed. Reg. 22778 (June 1, 1984), and that determination was sustained in *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985). The decision below, however, is not in conflict with that ruling and does not involve the federal question which that ruling presents.

with the new emissions standard as "expeditiously as practicable" but a second environmental regulation, AQR 705, further required IMC immediately to obtain and to operate under a schedule of compliance designed "to achieve compliance with the applicable regulations as expeditiously as practicable." Pl. Ex. 20, p. 4. Under IMC's schedule of compliance, once IMC had determined and had notified the EIB that the salting out process was commercially operational and that no additional design, procurement, or construction was necessary, IMC became barred by New Mexico law from using the Ozarks and from continuing the air pollution that they had caused. Pl. Ex. 25, p. 2. *See also* N.M. Stat. Ann. §§ 74-1-10 and 74-2-12 (1978).

Llano further complains about an alleged lack of notice. Pet. 9-11. The court of appeals agreed that IMC had not given Llano the full notice required by paragraph 15 of the contract, relating to force majeure. Pet. App. A-10. But the court's decision turned on paragraph 16 of the contract, which "affords the buyer additional protection." *Id.* at A-11. That provision contained no notice requirement. *See id.* at A-5. In any event, IMC had given Llano repeated notice that it was conducting a test of the salting out process and that its gas consumption would be substantially reduced as a result. *See* II R. 160, 162; III R. 259-60; Pl. Ex. 30; Def. Ex. C-7. This notice was adequate to permit Llano to dispose of its excess gas at a significantly greater profit than it would have received if the gas had been delivered to IMC. Pl. Exs. 47 and 48.

In summary, IMC promptly and conscientiously complied with a new state environmental regulation, and it did not cause Llano to suffer any economic loss by doing so. Especially in these circumstances, the court of appeals quite properly read the contract as excusing IMC from paying "for any natural gas it did not take under the contract." Pet. App. A-13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KEITH A. JONES *
JOHN B. RUHL
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

JAMES P. HOUGHTON
MARK B. THOMPSON, III
MODRALL, SPERLING, ROEHL,
HARRIS & SISK
1000 Sunwest Building
Albuquerque, New Mexico 87103

* Counsel of Record